Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–131–92
HAIDAR J
25 MARCH 1994

Civil Procedure *— Injunction — Mareva — Setting aside — Sub-contractor obtained injunction to prevent main contractor from receiving money owed to it by project owner — Whether there was a real risk that assets of main contractor would be dissipated*

Civil Procedure *— Injunction — Mareva — Setting aside — Sub-contractor obtained injunction to prevent main contractor from receiving money owed to it by project owner — Whether sub-contractor had good arguable case — Whether sub-contractor failed to disclose main contractor's counterclaim*

Civil Procedure *— Injunction — Mareva — Setting aside — Sub-contractor obtained injunction to prevent main contractor from receiving money owed to it by project owner — Wording of injunction order peculiar — Whether order defective — Whether order could be varied*

Civil Procedure *— Injunction — Mareva — Setting aside — Sub-contractor obtained injunction to prevent main contractor from receiving money owed to it by project owner — Whether prejudice to main contractor was a good ground to set aside injunction*

Civil Procedure *— Injunction — Mareva — Setting aside — Sub-contractor obtained injunction to prevent main contractor from receiving money owed to it by project owner — Whether injunction obtained for improper purpose*

Civil Procedure *— Judgment — Stay of execution — Counterclaim by defendant — Whether counterclaim bona fide*

Civil Procedure *— Counterclaim — Damages suffered after writ issued — Whether recoverable by way of counterclaim*

Contract *— Damages — Remoteness — Moneys paid by defendant to third party in lieu of liquidated damages — Whether recoverable from plaintiff by way of counterclaim — Whether too remote*

Contract *— Damages — Breach — Transportation costs incurred in obtaining substitute goods — Costs offset by lower price of substitute goods — Whether recoverable*

Contract *— Damages — Remoteness — Liquidated damages — Whether amount claimed was in reasonable contemplation of the parties — Whether contract sum a relevant consideration*

Contract *— Damages — Mitigation — Available market — Defendant should have mitigated loss by obtaining substitute as there was an available market*

The plaintiff's claim was for recovery of the price of goods (bricks) sold and delivered to the defendant for use in a project for which the

defendant was the main contractor. The project was completed and RM7,680,000 was paid to the defendant, leaving the retention sum of RM200,000 still owing by the owner of the project, Yangtze Kiang Bhd, to the defendant. The plaintiff obtained summary judgment against the defendant for the sum of RM163,585.41 and a Mareva injunction to freeze the RM200,000, which was alleged to be the only known asset of the defendant. The defendant appealed against the order for summary judgment and applied to set aside the injunction on the grounds that: (a) there was no real risk of dissipation of the defendant's assets; (b) there was no good arguable case and the plaintiff had failed to disclose defendant's defence of set-off and counterclaim; (c) the defendant had assets within jurisdiction; (d) the order granting the injunction was worded in peculiar terms; (e) there was prejudice caused to the defendant; and (f) the Mareva injunction was obtained for a wrong purpose. The defendant also applied for a stay of execution of the judgment pending the outcome of its counterclaim against the plaintiff for alleged breach of contract and claimed for: (i) liquidated and ascertained damages ('LAD') of RM32,000 which the defendant paid to Yangtze Kiang Bhd; (ii) transportation costs of RM400 incurred by having to buy replacement bricks; and (iii) overhead site expenses of RM121,800.

Held, dismissing the appeal:

(1) It appeared that the only known asset of the defendant was the RM200,000 held by Yangtze Kiang Bhd. What happened to the RM7,680,000 paid to the defendant remained unexplained and the irresistible inference was that there was a risk that the defendant may dissipate the RM200,000, thereby frustrating the plaintiff of the proceeds of the action against the defendant. In an application for a Mareva injunction, the plaintiff needs to show that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than a 50% chance of success and secondly, that there is a real risk or a risk that the assets will be dissipated. Having considered the affidavit evidence of both parties, the court was satisfied that the plaintiff had met the requirements for a Mareva injunction.

(2) The plaintiff had disclosed the defendant's defence and counterclaim in the affidavit in support of the Mareva injunction. Therefore, the defendant's claim that it was not disclosed had no merit and amounted to misleading the court. Further, the summary judgment obtained by the plaintiff, although now under appeal to the judge-in-chambers, indicated that the plaintiff had a good arguable case.

(3) Although the order granting the Mareva injunction may not be perfect compared to the precedent produced by the defendant, it was not fatal as the wording sufficiently conveyed the order obtained. However, assuming that the order was defective, the parties were at liberty to apply for it to be varied and reformulated.

(4) Prejudice to the defendant is not by itself a ground to set aside a Mareva injunction.

(5) In this case, the Mareva injunction was to prevent the defendant from receiving the sum of RM163,585.41 standing to its credit with Yangtze Kiang Bhd, and thereby prevent the defendant from dissipating this sum of money, the only known asset of the defendant. Therefore, the contention of the defendant that the Mareva injunction was obtained for a wrong purpose had no merit.

(6) The question whether there should be a stay of judgment pending trial of the counterclaim would depend on whether the defendant has a plausible or bona fide counterclaim. The defendant had persistently failed to pay the plaintiff for the bricks supplied and the defendant's cheque was returned unpaid. The plaintiff treated that as an act of repudiation by the defendant and discontinued further supplies. On the facts, the court rejected the defendant's allegation of breach of contract by the plaintiff and, as it was no longer a triable issue, summary judgment could and should be made. The plaintiff was also entitled to interest of 1.5% per month for overdue accounts as the defendant had full knowledge of this and did not protest when the invoices were presented.

(7) In lieu of the payment of LAD, the defendant had paid RM32,000 to Yangtze Kiang Bhd by way of a trade discount. The discount was made well after the defence was filed and could not be allowed as any damages claimed by way of a counterclaim must be limited to the date when the writ was issued.

(8) With reference to s 74 of the Contracts Act 1950, the discount was not contractual in nature and not one which naturally arose in the usual course of things or which the parties knew when they made the contract to be likely to result from such breach. It was remote in nature and not reasonably in the contemplation of the parties at the time the contract was entered into.

(9) The counterclaim for cost of transportation for the replacement bricks was not tenable because the defendant did not suffer any loss due to the lower prices paid for the bricks. The gain made by the lower prices had offset the added cost of transportation.

(10) The proportion of bricks not supplied by the plaintiff was so small compared to the total value of the contract that it was not within the reasonable contemplation of the plaintiff that it would have to pay damages of RM2,100 per day for breach of contract. Therefore this alleged loss for overhead site expenses was too remote.

(11) Even assuming that the plaintiff was in breach of contract, the defendant should have mitigated his loss. The bricks were common bricks and there was no shortage in the market at the material time. In fact, the defendant was already buying bricks from another supplier at cheaper prices. The counterclaim was therefore not plausible or bona fide and the order for stay should not be made.

[Bahasa Malaysia summary

Tuntutan plaintif adalah untuk mendapat balik harga barangan (bata) yang telah dijual dan dihantar-serah kepada defendan untuk digunakan di dalam suatu projek di mana defendan merupakan kontraktor utama. Projek itu telah disiapkan dan sejumlah RM7,680,000 dibayar kepada defendan, meninggalkan jumlah pegangan sebanyak RM200,000 yang masih terhutang oleh tuan punya projek, Yangtze Kiang Bhd, kepada defendan. Plaintif telah mendapatkan penghakiman ingkar terhadap defendan untuk jumlah RM163,585.41 dan suatu injunksi Mareva untuk membekukan jumlah RM200,000 itu, yang dikatakan merupakan aset tunggal defendan yang diketahui. Defendan telah membuat rayuan terhadap perintah penghakiman ingkar itu dan memohon untuk mengetepikan injunksi itu atas alasan bahawa: (a) tidak ada risiko benar bahawa aset defendan akan lesap; (b) tidak terdapat kes baik yang boleh dihujahkan dan plaintif gagal mendedahkan pembelaan defendan iaitu tolakan dan tuntutan balas; (c) defendan mempunyai aset di dalam bidang kuasa; (d) perintah yang memberikan injunksi itu digubal dengan menggunakan perkataan yang aneh; (e) kemudaratan diakibatkan kepada defendan; dan (f) injunksi Mareva itu telah diperolehi bagi suatu tujuan yang salah. Defendan juga telah memohon untuk suatu penggantungan penghakiman semasa menunggu keputusan tuntutan balasnya terhadap plaintif untuk kemungkiran kontrak yang dikatakan telah dilakukan oleh plaintif dan membuat tuntutan untuk: (i) ganti rugi jumlah tertentu dan boleh ditentukan ('GRJT') sebanyak RM32,000 yang dibayar oleh defendan kepada Yangtze Kiang Bhd; (ii) kos pengangkutan sebanyak RM400 yang ditanggung kerana terpaksa membeli bata untuk menggantikan bata yang tidak dihantar oleh plaintif; dan (iii) belanja overhed kawasan projek sebanyak RM121,800.

Diputuskan, menolak rayuan itu:

(1) Adalah jelas bahawa aset tunggal defendan yang diketahui merupakan jumlah RM200,000 yang dipegang oleh Yangtze Kiang Bhd. Apa yang telah terjadi kepada jumlah RM7,680,000 yang dibayar kepada defendan masih tidak diterangkan dan inferens yang tidak dapat dielakkan adalah bahawa terdapat risiko defendan mungkin melesapkan jumlah RM200,000 itu, dan dengan demikian mengecewakan plaintif daripada hasil tindakannya terhadap defendan. Di dalam suatu permohonan untuk suatu injunksi Mareva, plaintif dikehendaki menunjukkan bahawa beliau mempunyai suatu kes baik yang boleh dihujahkan, yang melebihi takat di mana ianya hampir tidak boleh dihujahkan secara serius, tetapi tidak semestinya satu yang hakim percaya mempunyai cansa kejayaan lebih daripada 50% dan keduanya, bahawa terdapat suatu risiko benar atau suatu risiko bahawa aset itu akan dilesapkan. Selepas mempertimbangkan keterangan afidavit kedua-dua pihak, mahkamah berpuas hati bahawa plaintif telah memenuhi keperluan untuk suatu injunksi Mareva.

(2) Plaintif telah mendedahkan pembelaan dan tuntutan balas defendan di dalam afidavit yang menyokong permohonan untuk injunksi Mareva itu. Oleh demikian, tuntutan defendan bahawa pembelaannya tidak didedahkan tidak bermerit dan merupakan suatu tindakan mengelirukan mahkamah. Lebih-lebih lagi, penghakiman ingkar yang didapatkan oleh plaintiff, walaupun sekarang di bawah rayuan kepada hakim dalam kamar, menandakan bahawa plaintif mempunyai suatu kes baik yang boleh dihujahkan.

(3) Walaupun perintah yang membenarkan injunksi Mareva itu mungkin tidak sempurna berbanding dengan duluan yang dikemukakan oleh defendan, ianya tidak membawa padah kerana perkataannya menyampaikan maksud perintah yang diperolehi itu dengan mencukupi. Bagaimanapun, andaikan perintah itu cacat, pihak-pihak bebas memohon supaya ianya diubah dan dirumus semula.

(4) Kemudaratan kepada defendan dengan sendirinya tidak merupakan suatu alasan untuk mengetepikan suatu injunksi Mareva.

(5) Di dalam kes ini, injunksi Mareva itu adalah untuk menghalang defendan daripada menerima jumlah RM163,585.41 di dalam kreditnya dengan Yangtze Kiang Bhd, dan dengan demikian menghalang defendan daripada melesapkan jumlah wang ini, aset tunggal defendan yang diketahui. Oleh itu, penegasan defendan bahawa injunksi Mareva itu telah diperolehi untuk suatu tujuan salah tidak bermerit.

(6) Soalan sama ada seharusnya terdapat suatu penggantungan penghakiman semasa menunggu perbicaraan tuntutan balas akan bergantung kepada sama ada defendan mempunyai suatu tuntutan balas yang boleh dipercayai atau bona fide. Defendan terus gagal membayar plaintif untuk bata yang telah dibekalkan olehnya dan cek defendan telah dikembalikan tanpa bayaran. Plaintif telah menyifatkan tindakan itu sebagai suatu perbuatan penolakan oleh defendan dan menghentikan bekalan bata selanjutnya. Pada fakta kes ini, mahkamah menolak pengataan defendan mengenai kemungkiran kontrak yang dikatakan telah dilakukan oleh plaintif dan, memandangkan bahawa ianya tidak lagi merupakan suatu isu yang boleh dibicarakan, penghakiman ingkar boleh dan patut dibuat. Plaintif juga berhak mendapat faedah sebanyak 1.5% sebulan untuk akaun yang lampau tempoh kerana defendan mempunyai pengetahuan penuh mengenainya dan tidak membantah apabila invois dikemukakan.

(7) Sebagai ganti bayaran GRJT, defendan telah membayar jumlah RM32,000 kepada Yangtze Kiang Bhd melalui suatu diskaun perniagaan. Diskaun itu telah dibuat lama selepas pembelaan telah difailkan dan tidak boleh dibenarkan kerana sebarang ganti rugi yang dituntut melalui tuntutan balas mesti dihadkan kepada tarikh apabila writ itu dikeluarkan.

(8) Dengan merujuk kepada s 74 Akta Kontrak 1950, diskaun itu tidak bersifat suatu kontrak dan bukanlah satu bayaran yang timbul dalam keadaan biasa atau yang pihak-pihak itu mengetahui, apabila mengikat kontrak itu, mungkin diakibatkan oleh suatu kemungkiran sedemikian. Ianya bersifat di luar dugaan dan tidak munasabahnya di dalam pertimbangan pihak-pihak itu pada masa kontrak itu diikat.

(9) Tuntutan balas untuk kos pengangkutan bata untuk mengganti bata yang tidak dihantar oleh plaintif itu tidak dapat dipertahankan kerana defendan tidak mengalami sebarang kerugian akibat daripada harga yang lebih rendah yang dibayar untuk bata itu. Keuntungan yang diperolehi daripada harga yang lebih rendah itu telah mengimbangi kos tambahan untuk pengangkutan.

(10) Perkadaran bata yang tidak dihantar oleh plaintif begitu kecil jika dibandingkan dengan jumlah nilai kontrak itu sehingga ianya tidak di dalam pertimbangan munasabah plaintif bahawa ia mesti membayar ganti rugi sebanyak RM2,100 sehari untuk kemungkiran kontrak. Oleh itu, kerugian untuk belanja overhed kawasan projek yang dikatakan itu terlalu di luar dugaan.

(11) Walaupun diandaikan bahawa plaintif telah memungkiri kontrak itu, defendan seharusnya mengurangkan kerugiannya. Bata itu adalah bata biasa dan tidak ada kekurangan bata di dalam pasaran pada masa yang penting itu. Pada hakikatnya, defendan telahpun mula membeli bata daripada pembekal yang lain pada harga yang lebih murah. Oleh demikian, tuntutan balas itu tidak boleh dipercayai atau tidak bona fide dan perintah untuk penggantungan tidak seharusnya dibuat.]

Notes

For cases on mitigation of damages, see 3 *Mallal's Digest* (4th Ed) paras 1041–1044.

For cases on Mareva injunctions, see 2 *Mallal's Digest* (4th Ed) paras 1125–1135; [1989] Mallal's Digest 381–393; [1990] Mallal's Digest 285–287; [1991] Mallal's Digest 313–315; and [1992] Mallal's Digest 258–265.

Cases referred to

1 *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 (folld)

2 *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 (folld)

3 *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260 (refd)

4 *Societe Des Etains De Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267 (folld)

5 *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (refd)

6 *Original Hartlepool Collieries Co v Gibb* (1877) 5 Ch D 713 (folld)

A 7 *Kabatasan Timber Extraction Co v Chong Fah Shing* [1969] 2 MLJ 6 (refd)

Legislation referred to
Contracts Act 1950 s 74(1), (2)

B *Reginald Vallipuram* (*Reginald Vallipuram & Co*) for the plaintiff.
CP Soh (*Paul Cheah & Associates*) for the defendant.

Cur Adv Vult

C **Haidar J**: There are two applications before me, viz:

(1) an appeal to the judge-in-chambers against the decision of the senior assistant registrar in respect of summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') (encl 23); and
(2) a summons-in-chambers dated 26 September 1990 (encl 63) to set D aside the interim injunction order obtained by the plaintiff on 8 September 1993 and the consequential orders thereto.

I ordered that encl 63 be heard first.

Summons-in-chambers dated 26 September 1993 (encl 63)

E The plaintiff obtained summary judgment against the defendant in the sum of RM163,585.41 together with interest on 10 November 1992 as per its application (encl 8). In the meantime, by consent, the plaintiff agreed to the application of the defendant for stay of execution pending the appeal to the judge-in-chambers by the defendant (encl 27). Subsequently, the plaintiff F filed a summons-in-chambers dated 4 September 1993 (encl 52) for a Mareva injunction order and was heard ex parte on 8 September 1993 and an order in terms granted accordingly.

The ex parte application of the plaintiff is supported by the affidavit of one Tan Thian Paw, the executive director of the plaintiff (encl 51).

The facts as disclosed in the affidavit in support are:

G The plaintiff's claim is for recovery of the price of goods sold and delivered by the plaintiff to the defendant for use in a project that was being undertaken by the defendant known as the 'Proposed Garment Factory on Lot No 6412, Jalan Ungku Mohsin, Johor Bahru' for the owners, Messrs Yangtze Kiang Bhd, at a total cost of RM7,880,000.

H The project has been completed and it is believed that save for the retention sum of RM200,000 the balance of the contract sum has been released to the defendant [by Messrs Yangtze Kiang Bhd]. The retention sum may be released to the defendant sometime in the middle of September 1993 and it is the only known asset of the defendant. If the summary judgment obtained is affirmed on appeal, the plaintiff contended that there I is a real risk that the defendant would deal with the retention sum thereby frustrating the plaintiff in the recovery of the fruits of the judgment.

According to the knowledge of the plaintiff, the nominated sub-contractors harboured doubts about getting their payments from the defendant and

secured arrangement whereby they were to be paid directly by Yangtze Kiang Bhd (see exh TTP–1).

Even though the plaintiff obtained a guarantee in writing from Chin Park Kong and Kong Yuen Foo to guarantee payment of all outstanding debts from the defendant, their capacity to pay was doubted by the plaintiff as it is a large sum.

The plaintiff believed that if the defendant has notice of the application for a Mareva injunction, the defendant would in all likelihood expedite the release of the payment of the retention sum to it and thus frustrate the application (see *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd*[1] at p 144).

Order in terms was accordingly made by the court on 8 September 1993.

The defendant's counsel in his written submission to set aside the order made by me on 8 September 1993 put forward the following grounds:

(a) [there was] no real risk of dissipation;
(b) [there was] no good arguable case and non-disclosure of defendant's defence of set-off and counterclaim;
(c) [there were] assets within jurisdiction;
(d) the peculiar term of the order dated 8 September 1993;
(e) prejudice to the defendant; and
(f) the Mareva injunction order [was obtained] for a wrong purpose.

Ground (c) was not pursued by the defendant's counsel at the hearing before me. I will therefore confine [myself] to the other grounds in the order as set out by the defendant's counsel in his written submission.

(a) No real risk of dissipation

The defendant's counsel submitted that the plaintiff must show *solid evidence* that the defendant's assets will be dissipated and cited a passage in *S & F International Ltd v Trans-Con Engineering Sdn Bhd*[2] at p 64. I am of the view that the learned counsel had over-emphasised the word 'solid' used by the Federal Court. Whether the defendant's assets will be dissipated to the prejudice of the plaintiff's claim is actually a matter of evidence (see *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd*[3] at p 264). The issue here is whether the plaintiff had shown evidence of dissipation of assets within the jurisdiction.

In considering the evidence in that respect, I would adopt the view of Edgar Joseph Jr J (as he then was) in *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd*[1] where at p 150 his Lordship said:

> Because in many cases, there will be a practical difficulty of proving the requisite intent, I prefer the view that *it would be sufficient for the plaintiff to merely show a risk of disposal of assets* which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant. (Emphasis added.)

Now, the assertion of the plaintiff that the only known asset of the defendant is the retention sum of RM200,000 has not been refuted by the defendant. Neither did the defendant refute the evidence that the sub-contractors of

A the defendant had to secure direct payments from Messrs Yangtze Kiang Bhd due to doubts as to whether the defendant could pay its creditors (see exh TTP–1). The defendant merely deposed that those facts did not constitute dissipation by the defendant of its assets thereby depriving the plaintiff of payment from the defendant. However, this is one of the factors that the court could take into consideration in considering whether the B plaintiff has proved the risk that the assets will be dissipated within the jurisdiction by the defendant.

In addition thereto, the plaintiff had shown lack of probability on the part of the defendant by relying on the following:

C (a) that another creditor, Tetuan Pertama Ready Mixed Concrete (M) Sdn Bhd, had to resort to litigation to recover the sum of RM60,990.13 that was due to them and the defendant negotiated for payment of the judgment debt by six instalments (para 15 of encl 62); and

(b) the defendant did not disclose what happened to the payment of almost RM7,680,000 received from Messrs Yangtze Kiang Bhd (the receipt D whereof has not been denied by the defendant) as the defendant would now rely on the retention sum of RM200,000 to pay:

(i) the cost of defective works;

(ii) the sum of RM60,990.13 due to Tetuan Pertama Ready Mixed (M) Concrete Sdn Bhd;

E (iii) the plaintiff's claim of RM163,585.41 plus interest and costs (if successful); and

(iv) damages of RM32,000 that the defendant has to pay Messrs Yangtze Kiang Bhd.

As regards the contention of the defendant that the directors of the defendant F had furnished a personal guarantee and that the directors had been sued in their personal capacities, this fact was disclosed in the affidavit of the plaintiff (para 14.0 in encl 51). However, their creditworthiness was not shown as there is no evidence to show that they would be able to satisfy the judgment against the defendant.

G The facts of this case relating to the Mareva order in respect of money held under a main contract are to that extent more or less similar to the case of *S & F International Ltd v Trans-Con Engineering Sdn Bhd*[2] where the Federal Court held, inter alia:

> (2) It would appear that on a consideration of the affidavit evidence the moneys due from the Board to the appellant are its only asset of any substance H within the jurisdiction, that the respondent has a strong arguable case on the facts in relation to the claim for moneys due and payable in the sum of $2,205,822.40 and that there is a risk of dissipation of the appellant's assets particularly in the light of the fact that its corporate structure infers that it is not to be relied upon.

I Similarly here, it would appear that the only known asset of the defendant is the retention sum of RM200,000 (not denied anywhere in the affidavit evidence by the defendant) held by Messrs Yangtze Kiang Bhd. The bulk of the contract sum had been paid to the defendant (again no affidavit

evidence denying this) and yet from para 15 of the affidavit of Kong Yuen Foo (encl 62) the defendant hoped to pay one creditor, Tetuan Pertama Ready Mixed Concrete (M) Sdn Bhd, the sum of RM60,990.13 and, for that matter, this sum was to be paid in six instalments. What happened to the bulk of the contract sum paid to the defendant remained unexplained by the defendant and the irresistible inference is that there is a risk that the defendant may dissipate the only known asset of RM200,000 thereby frustrating the plaintiff of the proceeds of the action against the defendant.

I am of the opinion that the plaintiff had shown by evidence the danger of the only available asset of RM200,000 of the defendant would be dissipated to prejudice the plaintiff's claim.

(b) No good arguable case and non-disclosure of defendant's defence of set-off and counterclaim

In the affidavit in support of the Mareva order (encl 51), the defendant's defence and counterclaim was disclosed (see para 4.0). For the defendant's counsel to claim that it was not disclosed would amount to misleading the court. In fact the defendant admitted owing a sum of RM163,585.41 but said that it was not liable in view of the counterclaim filed against the plaintiff (see para 17 of the affidavit of defendant at encl 15). Further, at the time of the application for the Mareva order, the plaintiff had obtained a summary judgment though it is now under appeal to the judge-in-chambers. It indicates to my mind, that the plaintiff has a good arguable case.

Therefore the defendant's contention on this ground has no merits.

(d) Peculiar terms of the order dated 8 September 1993

This issue was never raised in the affidavit-in-reply of the defendant. In any event the order may not be a perfect one if compared to the precedent produced by the defendant at pp 76–77 of the bundle of authorities (A1). I am of the view that it is not fatal as the wording sufficiently conveyed the order obtained. However, assuming that the order is defective, it can be varied and reformulated. Parties are at liberty to apply.

There is no merit on this ground.

(e) Prejudice to the defendant

It is not a ground by itself to set aside the Mareva order. However, the defendant is at liberty to come to court to vary the Mareva order obtained.

In *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd*,[1] at p 145 Edgar Joseph Jr J (as he then was) said:

> Whereas, a Mareva applicant need only show that there is a real risk, or at least a risk, that the defendant will dissipate his assets with the object, or with the effect, of putting them out of the plaintiff's reach, thus stultifying any judgment he may recover. *The court will not go into the likelihood of prejudice in the shape of dissipation of assets; the risk of it is enough.* (Emphasis added.)

This ground is devoid of merits.

(f) Mareva order for wrong purpose

It is settled law that a Mareva order is not intended to give a plaintiff priority over the assets of a defendant or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action (*S & F International Ltd v Trans-Con Engineering Sdn Bhd*,[2] at p 64).

The effect of the order really is to prevent the defendant from receiving the sum of RM163,585.41 standing to its credit with Yangtze Kiang Bhd, and thereby preventing the defendant from dissipating this sum of money, the only known asset of the defendant. There is nothing to stop any other creditor from garnishing this sum or for that matter for the defendant to apply to the court to vary the order to pay its debts.

On the facts of the case I am of the view that the contention of the defendant that the Mareva order was obtained for a wrong purpose has no merits.

In an application for a Mareva order, the plaintiff needs to show that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than a 50% chance of success and secondly, the plaintiff must show there is a real risk or risk that the assets will be dissipated (see *S & F International Ltd v Trans-Con Engineering Sdn Bhd*,[2] at p 64).

In this case, the plaintiff had obtained a summary judgment though under appeal presently, and having considered the affidavit evidence of both parties, I am satisfied that the plaintiff met the requirements for a Mareva order.

Appeal to the judge-in-chambers (encl 23)

The plaintiff's claim against the defendant is RM160,206.52 being the price of goods sold and delivered to the defendant and in addition thereto the plaintiff is claiming interest in the sum of RM3,378.89 on overdue accounts, thereby the total claim is for the sum of RM163,585.41.

The plaintiff took out an application for summary judgment under O 14 of the RHC and which application was granted by the senior assistant registrar on 10 November 1992. The defendant appealed against the said order.

The plaintiff's claim is based on 11 invoices for goods supplied during the period from 13 February 1992 to 9 May 1992 which amounted to RM160,206.52 which includes a Debit Note No 002/4/92 dated 17 April 1992 for RM234.80, an amount undercharged for Invoice 4918 dated 30 March 1992 (see para 4.0 of encl 9). In para 17 of the affidavit of Kong Yuen Seng, the director of the defendant (encl 15), the defendant admitted owing the plaintiff, subject to the counterclaim for damages. In that event, the claim of the plaintiff for a sum of RM163,585.41 (RM160,206.52 plus interest of RM3,378.89) is admitted by the defendant. In respect of the counterclaim, by a subsequent affidavit dated 26 February 1993 (encl 34), the liquidated and ascertained damages was reduced from RM360,000 to RM32,000. As a result, the counterclaim of the defendant would stand at RM153,940 comprising:

(i) Liquidated and ascertained damages	RM32,000
(ii) Cost of transportation of the common bricks	RM140
(iii) Overhead site expenses	RM121,800
	RM153,940

The question of whether there should be a stay on the judgment pending trial of the counterclaim would undoubtedly depend on whether or not the defendant has a plausible or bona fide counterclaim. In this respect, Abdoolcader J (as he then was) said, in *Societe Des Etains De Bayas Tudjuh v Wah Hong Mining Kongsi*,[4] at p 269:

> Where there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with a stay of execution until the trial of the counterclaim (*Sheppards & Co v Wilkinson & Jarvis* (1889) 6 TLR 13).

In granting the summary judgment the senior assistant registrar held that the counterclaim was not plausible and hence did not grant an order of stay.

The defendant's counterclaim arises from the alleged breach of contract on the part of the plaintiff in failing to supply 75,240 common bricks.

It is to be noted that there is no proper written contract between the parties in respect of the supply of goods to the defendant. Be that as it may, the relevant document is Purchase Order No 1102 which is for the supply of 250,000 bricks (see exh 'A' in encl 15). The plaintiff fulfilled the major part of the said purchase order by supplying 174,760 bricks but stopped or discontinued further supplies of the remaining 75,240 bricks as the defendant had persistently failed to pay the plaintiff the price of goods supplied to the defendant amounting to a sum of RM159,030.52 as at end of April 1992 (see paras 4.0 and 5.0 of encl 11A).

On 28 April 1992, the defendant gave the plaintiff a cheque for RM100,000 which according to the plaintiff, was part payment of the said outstanding debt. The cheque was postdated to 10 May 1992. The plaintiff presented the cheque for payment and it was returned unpaid as apparently the defendant stopped payment of the said cheque. On 25 May 1992, the plaintiff treated that as an act of repudiation of the contract on the part of the defendant and as a result discontinued further supplies (see paras 6.0, 7.0, 8.0 and 10.00 of encl 11A).

The defendant's explanation for issuing the said cheque was at the request of the plaintiff on the promise of the plaintiff to deliver the balance of the bricks according to the schedule. As the plaintiff failed to deliver the bricks according to the schedule, the defendant stopped payment of the said cheque. However, an examination of the letter from the defendant to the plaintiff in respect of the said cheque would seem to indicate a different story (see exh THP–5 (which should be marked as TTP–5)). THP–5 merely indicates that the said cheque was to be put on hold 'until further advice by us' and at the same time informing the plaintiff that the defendant expected payment within a couple of days. It would seem clear to me from THP–5 that the said cheque is not tied up to the further supply of the bricks according to the schedule, but towards part payment of the outstanding

A debt. In fact, the said cheque was issued after the last delivery was to be made, ie 28 March 1992. Further, when the said cheque was given to the plaintiff on 28 April 1992, though postdated to 10 May 1992, the defendant had already bought 16,720 of the 75,240 bricks from other sources and at a cheaper price also (see exh B to encl 15). In fact, as at the date of the B presentation of the said cheque on 25 May 1992 when there was no further advice from the defendant, and the said cheque was returned as payment was stopped, the defendant had bought 38,000 (including 16,720) of the remaining 75,240 bricks from other sources leaving a balance of 37,240 only to be supplied. The defendant's contention that the stop-payment of the said cheque was tied up to the supply of the bricks according to C schedule could not in the circumstances be correct and is inherently improbable. By the conduct of the defendant, the plaintiff contended that there was a repudiation of the contract on the part of the defendant thereby entitling the plaintiff to discontinue further supplies of the bricks. The defendant did not at any time before ordering the supplies from the other D sources, notify the plaintiff of the alleged breach by the plaintiff in the stoppage of further supplies of the remaining bricks. In the result, the plaintiff contended that it had not breached the contract and as such the defendant had no right to counterclaim against the plaintiff for damages. In other words, though there would appear to be facts denied or disputed, from the contemporary documents and other statements made by the E deponents on behalf of both parties, it is clear to me that I am entitled to reject the assertion of the defendant on the alleged breach of contract by the plaintiff. In the result, it is no longer a triable issue and a summary judgment could and should be made (see *Bank Negara Malaysia v Mohd Ismail & Ors*[5]).

F In respect of the claim of interest of 1.5% per month for overdue accounts by the plaintiff, the defendant cannot deny this claim as it had full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest. It is similarly not a triable issue at all.

G Having ruled that the summary judgment was properly made by the senior assistant registrar, I next have to consider whether an order of stay should be made in view of the counterclaim of the defendant which more or less equals the plaintiff's claim (see *Societe des Etains De Bayah Tudjuh*'s case,[4] at p 269). In this respect, I have to examine whether the counterclaim H is plausible or bona fide.

(i) *Liquidated and ascertained damages (LAD)*

The defendant filed a counterclaim under this item for a sum of RM360,000 at the rate of RM8,000 per day.

I It would appear that the defendant, by way of affidavit dated 5 September 1992 at para 9 (encl 13) did not dispute that all moneys retained for LAD had been released but claimed, however, that this did not mean that LAD would not be imposed at any time in the future. It would seem clear therefore that at the date of the hearing of the application for summary

judgment, that is, 10 November 1992, before the senior assistant registrar, there was no longer any basis for the counterclaim of RM360,000.

The defendant subsequently somewhat filed a fresh affidavit dated 26 February 1993 (encl 34) to say that in lieu of the payment of LAD in January 1993, the defendant was required to pay RM32,000 to Yangtze Kiang Bhd by way of a group trade discount. The interesting point of law that arises here is whether the defendant can rely on the alleged loss of RM32,000 as a counterclaim when it accrued well after the defence was filed. According to *Original Hartlepool Collieries Co v Gibb*,[6] when a defendant delivers a counterclaim, any damages thereby claimed must be limited to the date when the writ was issued. In any event, the group trade discount that was given to resolve matters between the defendant and Yangtze Kiang Bhd was not contractual in nature. In this respect, s 74 of the Contracts Act 1950 is relevant and reads:

> Compensation for loss or damage caused by breach of contract.
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

It would appear therefore that the group trade discount was not a loss which naturally arose in the usual course of things or which the parties knew when they made the contract to be likely to result from such breach. It is remote in nature and is not a loss which can reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into between the plaintiff and the defendant.

(ii) *Cost of transportation*

The counterclaim under this item is not tenable as the plaintiff had succeeded in showing that the defendant did not suffer any loss as shown hereunder:

			RM
Contract price stipulated by the plaintiff:	75,240 x 24.5	=	18,433.80
Price paid by the defendants:	75,240 x 24	=	18,197.60
Gain			236.20

There is therefore a nett gain of RM236.20 – RM140 = RM96.20.

The defendant in its defence said that it had to buy the bricks at higher prices (see para 11 of the statement of defence at exh F in encl 15).

This fact is definitely not true as clearly it had bought bricks at cheaper prices as shown above.

(iii) *Overhead site expenses*

The claim of damages of RM121,000 under this item is, according to the plaintiff, remote and is not a loss within the contemplation of s 74 of the Contracts Act 1950. To support this contention, the plaintiff submitted:

A (a) Total project costs RM7,880,000
Value of contract for the supply of bricks:
250,000 x 24.5 RM61,250

Therefore, the contract for the supply of bricks in terms of the project value is approximately 0.00777%.

B (b) Value of bricks not supplied: 75,240 x 24.5 = RM18,433.80

Therefore, the value of the bricks not supplied was 0.002% of the contract value of the project.

In the circumstances, for such a small contract it is not within the C reasonable contemplation that the plaintiff will have to pay damages of RM2,100 per day if there is a breach of contract in not supplying the bricks. Therefore the alleged loss under this item is remote and not a loss which arose in the usual course of things or which the parties knew when they made the contract likely to result from such breach.

In addition thereto, even assuming that the plaintiff was in breach of the D contract, the defendant had not mitigated its damages. The supply of the bricks as per the contract are common bricks and they are not specialised products that require time to manufacture. There was no shortage of bricks in the market at the material time (see paras 4.0 and 6.0 in encl 18) and in fact the defendant was already buying bricks from Messrs Lin Hoo Brothers and on top of that at cheaper prices! (See *Kabatasan Timber Extraction Co* E *v Chong Fah Shing*.[7])

Therefore, if the defendant had mitigated its losses by buying bricks from other sources the defendant, as I said earlier, would, as a matter of fact have suffered no loss.

In all the circumstances of the case, I am of the view that the counterclaim F is not plausible or bona fide. In that event, this is a case where I should not make an order of stay pending the trial of the counterclaim and I do so order.

The defendant may, at best, claim for loss suffered as a result of having to pay cash for the bricks from other sources and such loss, to my mind, may be quite minimal. However, no such claim was put forward by the G defendant.

I would therefore make the following orders in respect of encls 63 and 23:

(1) The application of the defendant to set aside the Mareva order is dismissed.
H (2) The appeal by the defendant against the order of the senior assistant registrar in respect of summary judgment to the plaintiff is dismissed.
(3) There shall be no order of stay of the summary judgment.
(4) Costs in respect of encls 63 and 23 to the plaintiff.

I *Order accordingly.*

Reported by Anne Khoo